are clearly inconsistent and both cannot be taken advantage of.[11] Thus a suit to judgment upon a written contract as executed bars the right to a reformation of the contract in equity on the ground of mistake.[12] Similarly, it is generally held that there can be no rescission for fraud after the contract has been affirmed by an action for deceit.[13] And the converse is also true.[14]

The basis of the buyer's relief by recoupment for breach of warranty is that, since he has not received what he contracted for, he should pay only the actual value to himself of what he has received. It is inherently similar to a recovery in quasi-contract,[15] and hence should be treated as a disaffirmance of the contract.[16] A leading English case allows an action on the contract after recoupment, on the ground that the buyer could receive no compensation for consequential damages by recoupment; [17] but the American cases to the contrary seem correct.[18] And the same reasoning would oppose recovery by both recoupment and rescission. Where, however, the consistency of the remedies of rescission and action on the contract is concerned, the proper course is not so clear. It has been argued that on principle the buyer should have the right to rescind the transfer of property without rescinding the contract.[19] No doubt the parties might so agree. But in the absence of such agreement the authorities support the decision in the principal case.[20] According to principles of contract law, the two remedies should be coexistent; but, probably because the remedy for breach of warranty was originally in tort,[21] the courts have never viewed the matter in this light. And in the Sales Act it is provided that "when the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.[22] The argument relied upon in the dissenting opinion of the case under discussion, that under the Code a plaintiff may unite several causes of action arising out of the same transaction, is not sustainable. The Code removes the technical forms of action, but it does not purport to alter the substance of a party's rights.[23]

BROKEN TRANSIT IN SALES OF PERSONALTY. — Lord Mansfield's opinion that the seller's right of stoppage *in transitu* lasts until actual corporal delivery to the buyer is no longer followed.[1] On the other hand, not every

[11] See Johnson-Brinkman Commission Co. *v.* Mo. Pac. Ry. Co., 52 Mo. App. 407.
[12] Thomas *v.* Joslyn, 36 Minn. 1.
[13] Kimball *v.* Cunningham, 4 Mass. 502; see Stuart *v.* Hayden, 72 Fed. 402, 411. But see Emma Silver Mining Co. (Ltd.) *v.* Emma Silver Mining Co. of N. Y., *supra.*
[14] Farwell *v.* Myers, 59 Mich. 179; but see Cohoon *v.* Fisher, 146 Ind. 583.
[15] See Mondel *v.* Steel, *supra.*
[16] Williston, Sales, § 612.
[17] Mondel *v.* Steel, *supra.*
[18] Gilmore *v.* Williams, 162 Mass. 351; Berman *v.* Henry N. Clark Co., 194 Mass. 248.
[19] Williston, Sales, § 612.
[20] Park *v.* Richardson & Boynton Co., 81 Wis. 399; Mundt *v.* Simpkins, 81 Neb. 1.
[21] See Schuchardt *v.* Allens, 1 Wall. 359, 368.
[22] Sales Act, § 69 (2). See Williston, Sales, § 604.
[23] See Maxwell *v.* Farnam, 7 How. Pr. 236; 7 Encyc. Plead. & Prac. 362, n.

[1] Dixon *v.* Baldwen, 5 East 175, 184.

constructive possession by the buyer will terminate the transit.[2] What kind of constructive possession is sufficient for that purpose, is a question frequently raised where the journey of the goods is made up of several stages, the forwarding being done by agents standing in a more or less close relation to the buyer. While the cases are not entirely reconcilable,[3] the principle underlying them seems properly to be, that delivery into the hands of an agent of the buyer, whose possession is for a purpose other than that of merely sending the goods on to a definite destination, will end the transit.[4] If, however, the agent's authority is simply to forward to a definite place, the goods continue in transit while in his hands. Such was the holding in a recent English case. *Kemp* v. *Ismay, Imrie & Co.*, 100 L. T. R. 996 (Eng., K. B. D.).

Thus the transit is at an end if the agent either is authorized to hold the goods subject to the buyer's orders,[5] or has discretion as to the choice of destination.[6] But his general authority is not decisive; for if, by instructions from the buyer despatched either before or after[7] the goods are *en route*, his authority at the time of receipt has been curtailed to that of sending the goods on a specific journey, he is but a link in the transit.[8] The question on principle is one of fact only: whether the agent was more than a mere way station or not. Hence, in the absence of a contract giving the seller a lien till the goods reach a specified place,[9] the seller's belief as to the destination of the goods is immaterial.[10] Nor does anything turn upon the seller's knowledge[11] or ignorance[12] of the ultimate destination of the goods, or on the fact that his contract was to deliver F. O. B. cars or vessel.[13]

It would seem, then, that the possession by the buyer necessary for termination of transit is not determined by ordinary doctrines as to constructive possession through an agent; and accordingly that receipt of the goods by railroads, forwarding companies, truckmen, purchasing agents, etc., whose possession is for general purposes conceded to be that of the buyer,[14] is not such possession as will end the transit unless it satisfies the test herein advanced.[15] Nor does the degree of control possessed by the buyer over

[2] Bethell *v.* Clark, 19 Q. B. D. 553; 20 Q. B. D. 615. See Chandler *v.* Fulton, 10 Tex. 2, 15.

[3] See Williston, Sales, § 530.

[4] *Cf.* Bethell *v.* Clark, 20 Q. B. D. 615, 617; 2 Kent Com. 544, 545; Scott *v.* Grimes, 48 Mo. App. 521, 525.

[5] Dodson *v.* Wentworth, 4 M. & G. 1080; Becker *v.* Hallgarten, 86 N. Y. 167. But *cf.* Frame *v.* Oregon Liquor Co., 48 Or. 272.

[6] Leeds *v.* Wright, 3 B. & P. 320.

[7] Harris *v.* Tenney, 85 Tex. 254; Halff, Weiss & Co. *v.* Allyn & Co., 60 Tex. 278. See Harris *v.* Pratt, 17 N. Y. 249, 267. But see Bethell *v.* Clark, 20 Q. B. D. 615, 617.

[8] Jackson *v.* Nichol, 5 Bing. N. C. 508.

[9] *Ex parte* Watson, 5 Ch. D. 35.

[10] Aguirre *v.* Parmelee, 22 Conn. 473. *Cf.* London, etc., R'y *v.* Bartlett, 7 H. & N. 400. The language in many of the cases looks the other way. Coates *v.* Railton, 6 B. & C. 422; Atkins *v.* Colby, 20 N. H. 154.

[11] *Ex parte* Miles, 15 Q. B. D. 39.

[12] *Ex parte* Rosevear China Clay Co., 11 Ch. D. 560; Aguirre *v.* Parmelee, *supra. Contra*, Jobson *v.* Eppenheim & Co., 21 T. L. R. 468.

[13] *Re* N. Y. House Furnishing Goods Co., 169 Fed. 612; Berndtson *v.* Strang, L. R. 4 Eq. 481.

[14] Cusack *v.* Robinson, 1 B. & S. 299. See Guilford *v.* Smith, 30 Vt. 49, 65.

[15] Aguirre *v.* Parmelee, *supra;* Scott *v.* Grimes, *supra;* Scott *v.* Pettit, 3 B. & P. 469; *Ex parte* Barrow, 6 Ch. D. 783.

his agent seem material; for the buyer's power to affect the journey of the goods is equally great whether the agent is a common carrier or the buyer's private forwarder.[16] Hence, where the buyer sends his own vessel or cart for the goods, it is difficult to see why the goods are not still in transit, though in the control and constructive possession of the buyer, if the servant's only authority on receipt is to convey them to a specified place. The authorities are, however, almost unanimous that if such an agent receives the goods for the purpose of making final delivery in person, the transit is thereupon ended.[17]

RECENT CASES.

ACCOUNT — ACCOUNT STATED — PROMISSORY NOTES AS BASIS FOR ACCOUNT STATED. — The plaintiff held four overdue promissory notes made by the defendant. After calculating the interest, he stated to the defendant the total amount due. The defendant admitted that the amount was correct. *Held*, that the plaintiff cannot recover as for an account stated. *Jasper Trust Co.* v. *Lampkin*, 50 So. 337 (Ala.).

If a creditor states and a debtor admits that as a result of a past transaction a fixed sum is due, the court will imply a promise to pay such sum. If the debt is not liquidated, this promise is good consideration for the creditor's implied promise to accept the sum stated as payment, and the latter can bring an action on an account stated. The debt, if unliquidated, need not be for more than one item. *Knowles* v. *Michel*, 13 East 249. But there is no legal detriment in a promise to pay a liquidated debt; and since in the principal case the interest had only to be computed, the court properly considered the debt liquidated and denied recovery. The decision may also be supported by the rule that a specialty cannot be merged into an obligation of lesser dignity such as an account stated. *Young* v. *Hill*, 67 N. Y. 162. Since negotiable instruments may well be treated as commercial specialties this rule might properly be extended to them. But see *Highmore* v. *Primrose*, 5 M. & S. 65.

ADMIRALTY — CONTRACTS — MORTGAGEE'S RIGHT TO FREIGHT. — After coal was supplied to a vessel on the mortgagor's credit, the mortgagee took possession of the vessel. The freight money which was thereafter earned on the homeward voyage was paid into court and claimed by the parties who had supplied the coal. *Held*, that the freight money belongs to the mortgagee. *El Argentino*, 101 L. T. R. 80 (Prob. Div. Eng.).

When a mortgagee takes possession of a vessel, he becomes its owner and is entitled to its earnings, regardless of antecedent contract rights. *Keith* v. *Burrows*, 2 A. C. 636; *Pelayo* v. *Fox*, 9 Pa. St. 489. In England, it is settled that no materialman can have a lien. *Northcote* v. *Owners of the Henrich Björn*, 11 A. C. 270. Hence the principal case correctly decides that when title to the coal was transferred to the mortgagor the seller lost all interest therein. See *The Two Ellens*, 26 L. T. R. 1; *The Pacific*, Brown & L. 243. In America the same result should be reached if supplies are furnished in domestic ports; but not if furnished in foreign ports. See *The J. E. Rumbell*, 148 U. S. 1. For in the latter case, a lien

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[16] London, etc., R'y *v.* Bartlett, *supra;* See Whitehead *v.* Anderson, 9 M. & W. 518, 534.

[17] Schotsmans *v.* Lancashire, etc., R'y Co., L. R. 2 Ch. 332. *Contra*, Newhall *v.* Vargas, 13 Me. 93. See also Merchant's, etc., Co. *v.* Phenix, etc., Co., 5 Ch. D. 205, 219.